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ADR in the Federal Courts—One Judge's Perspective: Issues and Challenges Facing Judges, Lawyers, Court Administrators, and the Public*

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I. INTRODUCTION

Many view the 1976 Pound Conference on the Popular Dissatisfaction with the Administration of Justice as the beginning of the modern Court Reform/Alternative Dispute Resolution Movement.¹ Although I attended that Conference, my education in alternative dispute resolution (ADR)², or “appropriate dispute resolution,” as I prefer to call it, began in 1950 during my first year of law school when I took a course in Common Law Actions from Dean Roscoe Pound. In that course and in several others I was privileged to take from him, he emphasized that the substantive law was always less important than the process used to provide a fair and just resolution to a conflict. His teaching had a profound effect on my life and on my several career choices. I inserted his famous 1906 address on “The Popular Causes of Dissatisfaction with the Administration of Justice” in the first chapter of my casebook on judicial

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¹ Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait, Accompli, Failed Overture, or Fledgling Adulthood*, 11 OHIO ST. J. ON DISP. RESOL. 297, 309 (1996); see THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (A. Leo Levin & Russell R. Wheeler eds., 1979).

² I use this term as denoting appropriate forms of dispute resolution as an alternative to traditional or full-fledged litigation.

administration.³ It influenced my decision to establish a Dispute Resolution Center in the late 1960s at the University of Southern California Law Center when I was Dean, and it affected my decision to participate actively in supporting ADR as a federal judge. One other major influence was my membership in the Bahá'í Faith, a world religion that practices the art of consultation, a high form of mediation in over 200 countries and territories of the world.

There certainly is not agreement about the value of annexing ADR to the courts. I was a little dismayed to read the 1993 Schwartz Lecture by Professor Laura Nader who described the ADR movement as a by-product of society's attempt to suppress or conceal uncomfortable conflicts.⁴ My dismay was not diminished when I read the 1994 Schwartz Lecture by Professor Judith Resnik which appeared to conclude that the ADR movement had brought a regrettable closing of the courthouse, or at least raised barriers to entry, and replaced reflective decision making about claims and controversies with mere dispute processing.⁵ The fact that both of these outstanding scholars served on my faculty when I was law dean gave me pause. My mood improved when I read the 1995 Schwartz Lecture by Judge Jack B. Weinstein who put forth a more optimistic view of ADR and the courts, which I share.⁶

Contributing to the accelerating pace of the ADR movement has been the continuing criticism of the adversary system. The late Chief Justice Burger said in an address to the mid-year meeting of the American Bar Association in 1984 that reliance on the adversarial process as the principal means of resolving conflicting claims is

a mistake that must be corrected . . . For some disputes, trials will be the only means, but for many claims, trials by adversarial contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people.⁷

³ DOROTHY W. NELSON, CASES AND MATERIALS ON JUDICIAL ADMINISTRATION AND THE ADMINISTRATION OF JUSTICE 1 (1974).

⁴ Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 1-3 (1993).

⁵ Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995).

⁶ Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241 (1996).

⁷ Warren E. Burger, Address at the Mid-year Meeting of the American Bar Association, quoted in *Mid-Year Meeting of American Bar Association*, 52 U.S.L.W. 2471, 2471 (Feb. 28, 1984).

Judge Marvin Frankel, formerly a judge on the Second Circuit, after leaving the court wrote a scathing indictment of the adversary system in his book, *Partisan Justice*.⁸ He declared that the adversary system places too low a value on truth telling⁹ and that “[t]here are other goods but the greatest is winning. There are other evils, but scarcely any worse than losing.”¹⁰

Professor Jerold S. Auerbach explains other drawbacks of the adversary system in his book *Justice Without Law*, when he describes it as “a chilling Hobbesian vision of human nature. It accentuates hostility, not trust. Selfishness supplants generosity. Truth is shaded by dissembling. Once an adversarial framework is in place, it supports competitive aggression to the exclusion of reciprocity and empathy.”¹¹

Judge Ray Fisher of the Ninth Circuit delivered a speech in 1999 to the Center for Public Resources in New York City at the time he was Deputy Attorney General of the United States in which he said

On many occasions, it is neither cost-effective nor substantively advantageous to proceed by way of lawyers making arguments, engaging in a blitzkrieg of discovery and motions, and then waiting for and appealing decisions from administrative and judicial bodies. Clients want to remain in control of their disputes, but you can’t control the outcome of a matter once it is presented to a court for resolution. Moreover, when a court or jury decides who wins or who loses, that ruling may not resolve the underlying problems that caused the suit to be filed in the first place. Thus, this movement [ADR] is growing, not out of the benevolent altruism of the participants, but rather out of the recognition that in many circumstances, there are better ways to resolve disputes.¹²

II. WHY COURT-ANNEXED ADR IS GOOD

There are those who argue that if courts shift their focus to ADR, they will retard the development of the law by removing law-making cases from judicial decision-making.¹³ However, even in the absence of alternative procedures, less than five percent of cases go to trial, and in the traditional adjudicatory system, as in alternative procedures, potential law-making cases settle because the parties

⁸ MARVIN E. FRANKEL, *PARTISAN JUSTICE* (1980).

⁹ *Id.* at 12.

¹⁰ *Id.* at 18.

¹¹ JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW* vii (1983).

¹² Raymond C. Fisher, *Millennium Problem Solving: Improving the Legal Profession*, 17 *ALTERNATIVES* 105, 105 (1999).

¹³ Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073, 1085–90 (1984).

choose to do so.¹⁴ It is unimaginable that a judge would force parties to trial so that a new legal principle might be set.¹⁵

Courts have the opportunity to present new models to the community that can help to establish and maintain important norms for behavior of citizens.¹⁶ Alternative models can teach cooperation rather than emphasizing conflict, openness rather than secrecy, and dependence on oneself rather than authorities for the resolution of problems.¹⁷

Good ADR programs can contribute significantly to the quality of justice by providing better focused, more productive, and more efficient pretrial case development.¹⁸ In good ADR programs, communication across party lines is more direct, less constrained, more flexible, and less stylized than in traditional litigation.¹⁹ Further, they require consideration of facts through a type of exchange that communicates not only empirical information but also interpretive perspective, and they allow for use of norms, which is accommodative rather than binary, pluralist rather than singularist.²⁰

In the traditionally litigated case, the litigants themselves seldom participate either in attorney-negotiated settlements or judge-facilitated settlements. Research reveals that litigants express little satisfaction with either, ranking judicial settlement conferences as the least fair method for resolving cases.²¹ In addition, because settlement generally focuses on only money, litigants may believe that critical issues of right and wrong have been trivialized.²²

To those who argue that ADR is unnecessary because most claims settle anyway, the answer is that what litigants want—and what ADR provides—is a forum that they would not otherwise have in which their story may be told.

Frankly, there are times when a sophisticated, knowledgeable neutral can be much better than a judge. Such a neutral in an Early Neutral Evaluation (ENE) proceeding, who has subject matter expertise, can help the parties to understand each other more clearly, as well as the pertinent law and evidence. Most judges

¹⁴ DONNA STEINSTRA & THOMAS E. WILLING, *ALTERNATIVES TO LITIGATION: DO THEY HAVE A PLACE IN THE FEDERAL DISTRICT COURTS?* 16 (Federal Judicial Center 1995).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Wayne D. Brazil, *Why Should Courts Offer Nonbinding ADR Services?*, 16 *ALTERNATIVES* 65 (1998).

¹⁹ *Id.*

²⁰ See Melvin A. Eisenberg, *Private Ordering Through Negotiation, Dispute Settlement and Rulemaking*, 89 *HARV. L. REV.* 637, 638–39 (1976).

²¹ E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 *LAW & SOC'Y REV.* 953, 965 (1990).

²² *Id.* at 981.

are likely to have less time and less subject matter expertise than the evaluator.²³ Further, many judges do not consider it appropriate for them to give an assessment of the case's value.²⁴ Additionally, the parties may still go to court, so the evaluation may serve as a supplement and not as a substitute for traditional litigation.

An argument can be made that at least some litigants and lawyers have greater confidence in a court ADR process than a private one. A private provider, who may depend on large companies for repeat business, may not engender the same feeling of neutrality, especially if the alternative is a court neutral as is the case in the Ninth Circuit Court of Appeals. In addition, the public may have more confidence in a court-designed process than those developed in the private sector by entities with vested or other economic interests. For instance, in health care delivery, mandatory binding arbitration is becoming the norm in many places for substantial portions of the population. The question to be studied is whether these systems are fair when the claims and outcomes are confidential and need not be reported in any federal public forum, and when the parties have little to no say in negotiation, including the entitlement to be heard and represented at hearings. Consumer and employment contracts often involve less than arms-length negotiation of terms. Also, there often is inadequate access to the details of the arbitration programs by those who are most affected and who most often question the independence and impartiality of neutrals and of the administering institution.

Court-annexed ADR in well designed and managed programs can save litigants time and money. An example is the ENE program in the Northern District of California, which brings parties and a volunteer neutral together early in the litigation process to discuss and plan the case. At that time, the neutral addresses one of the major sources of litigation costs—discovery. In an evaluation of the ENE program, one third of the attorneys in the cases reported decreased costs and another third reported no known impact.²⁵ The median savings by attorneys was \$10,000 and \$20,000 by the parties.²⁶

Last, but certainly not of the least importance, ADR procedures can reduce pretrial demands on judges and allow them to give more time to trials. The purpose of ADR is not to force a reduction in trial rates, but to ensure that trial time is available for cases that need a trial or that will contribute to the development of the law.

²³ STIENSTRA & WILLGING, *supra* note 14, at 41.

²⁴ *Id.*

²⁵ Joshua Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487, 1488 (1992).

²⁶ *See id.*

III. BRIEF HISTORY OF ADR IN THE FEDERAL COURTS

The first mediation and arbitration programs began in the 1970s.²⁷ Summary jury trial and early neutral evaluation were innovations of the 1980s.²⁸ During that time there were two additional significant developments. The first formal recognition of ADR's role was stated in the 1983 amendment to the Federal Rule of Civil Procedure 16.²⁹ It provided for the use of "extrajudicial procedures to resolve the dispute."³⁰ The second was an act of Congress passed in 1988, which authorized ten district courts to implement mandatory arbitration programs and an additional ten to establish voluntary arbitration programs.³¹ Then, the Civil Justice Reform Act of 1990 (CJRA) gave further impetus to the ADR movement.³² It required all district courts to develop, with the help of an advisory group of local lawyers, scholars, and other citizens, a district-specific plan to reduce cost and delay in civil litigation.³³ ADR was one of six management principles recommended by the statute.³⁴ During the early and mid-1990s some federal district courts received modest levels of funding because the CJRA called for a limited number of pilot and demonstration districts.³⁵ How much money individual courts received depended on the level of initiative and commitment in each court to ADR, and this varied widely from district to district.³⁶ Indeed, many courts implemented no activity under CJRA and therefore, received no money.³⁷

²⁷ ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS 3 (1996). For a detailed history of ADR in the Federal Courts see EDWARD J. BERGMAN & JOHN G. BICKERMAN, COURT-ANNEXED MEDIATION: CRITICAL PERSPECTIVES ON SELECTED STATE AND FEDERAL PROGRAMS (1998); PLAPINGER & STIENSTRA, *supra*; STIENSTRA & WILLGING, *supra* note 14, at 3-7; Wayne D. Brazil, *Continuing the Conversation about the Current Status and the Future of ADR: A View from the Courts*, J. DISP. RESOL. 11, 14-26 (2000).

²⁸ *Id.*

²⁹ FED. R. CIV. P. 16(c)(7) (1983) (codified as amended at FED. R. CIV. P. 16(c)(9) (1993)).

³⁰ *Id.*

³¹ 28 U.S.C. §§ 651-658 (1994 & Supp. III 1997) (current version at 28 U.S.C. §§ 651-658 (Supp. V 1999)).

³² Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482 (1994 & Supp. V 1999).

³³ 28 U.S.C. §§ 471-472.

³⁴ 28 U.S.C. § 473.

³⁵ Brazil, *supra* note 27, at 17.

³⁶ *Id.*

³⁷ *Id.*

The CJRA expired on December 1, 1997.³⁸ Instead of terminating centralized support for ADR, the Judicial Conference on Court Administration sent a questionnaire to all ninety-four district courts asking each to certify the vitality of their ADR programs, so they might be considered for centralized staff funding.³⁹ Thirty-one of the ninety-four district courts did not even bother to respond, and an additional twenty-one reported that they had no programs or that their programs did not satisfy the criteria for effectiveness that the Conference had approved.⁴⁰ Of the forty-two courts that did qualify for some funding, only eight were deemed to have robust programs and thus received from two to four positions. The others, which qualified, received about one clerk per court. So fifty-two federal district courts (fifty-five percent) received no centralized funding to support any ADR activity.⁴¹

Then, Congress moved in a better direction when it passed the ADR Act of 1998.⁴² The Act requires every district court to “devise and implement” an ADR program that compels all civil litigants to consider the use of ADR and which provides them with at least one ADR process.⁴³ Each court has the discretion (in consultation with the bar and the local U.S. Attorney) to choose which processes it will offer and which categories of cases will be exempt from its ADR program.⁴⁴

The Act provides no money but it does authorize Congress to provide the necessary funding to implement its terms. Thus far, Congress has chosen not to do so. Courts must have the resources to run ADR programs and ensure the quality of ADR services. Despite the lack of current funding, I am optimistic about the positive effects of the Act. The Ninth Circuit Standing Committee on ADR has encouraged, with some success, our Court Circuit Executive to find at least some funds for those courts willing and anxious to expand their ADR programs. Other district courts find some money in their current budgets to fund some ADR programs.

Appellate mediation programs have existed since the late 1970s when the Second Circuit was the first to launch such a program and was followed by the Sixth Circuit in the early 1980s. The Ninth Circuit program, which was launched

³⁸ See Act of Oct. 6, 1997, Pub. L. No. 105-53, 111 Stat. 1173 (codified as amended at 28 U.S.C. § 471 (1994 & Supp. V 1999) (declaring that the requirements imposed by the Civil Justice Reform Act would expire seven years after the date of enactment).

³⁹ *Id.*

⁴⁰ *Id.* at 18.

⁴¹ *Id.*

⁴² 28 U.S.C. §§ 651–658 (Supp. IV 1998).

⁴³ 28 U.S.C. § 651.

⁴⁴ 28 U.S.C. § 652.

in the late 1980s, was at first opposed by many members of the bench and bar but is now widely acclaimed throughout our circuit. The court employs eight full-time circuit mediators, including a supervising Chief Circuit Mediator, to facilitate settlement of appeals. "They are highly experienced (averaging close to twenty years of experience) litigation attorneys from a variety of practices who have extensive training and experience in negotiation, mediation, and case management. In addition, all have . . . either taught, published or both."⁴⁵ Recent statistics show that of 880 cases mediated in 2000, 745 or eighty-five percent were settled.⁴⁶ The programs in other circuits vary considerably. Some are very small with only one staff attorney and reach a very small percentage of the civil cases on the docket.⁴⁷ Others use some staff professionals, but in most cases the mediators are private lawyers who have been selected and trained by the court.⁴⁸ They serve on only a few cases a year, usually on a pro bono basis, while maintaining a full time law practice.⁴⁹

After the 1998 ADR Act was passed, Chief Judge Hug of the Ninth Circuit appointed a Standing Committee on ADR to assist our circuit in implementing the Act. The Committee has created a Model Rule for all of the district courts, which has been approved by the Ninth Circuit Judicial Council.⁵⁰ The Committee is offering its services to any district desiring help in creating and implementing ADR programs. One of the reasons I am so optimistic about the development of ADR programs in our circuit is that several of the Chief Judges of our district courts have requested that members of the Standing Committee make presentations at the district court conferences for lawyers and judges. A further cause for optimism is the results of a survey of judges and lawyers at the Ninth Circuit Judicial Conference in August of 2000. Judges and lawyers were asked to respond to a series of questions about ADR and answered as follows. Ninety-six percent said judges should raise the issue of ADR at an initial case conference if no party has raised the issue. Seventy-nine percent said that a court has a responsibility to determine whether represented clients have had a meaningful opportunity to participate in decisions about whether or not to use ADR. Seventy-nine percent responded that it was appropriate for a judge to order the parties to participate in a non-binding ADR process (other than a judicial

⁴⁵ Memorandum from David E. Lombardi, Jr., Chief Circuit Mediator, Ninth Circuit, to Interested Parties 1 (May 19, 1999) (on file with author).

⁴⁶ Letter from David E. Lombardi Jr., Chief Circuit, Ninth Circuit, to Judge Dorothy W. Nelson, Ninth Circuit 1 (Mar. 12, 2001) (on file with author).

⁴⁷ Brazil, *supra* note 27, at 15.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ MODEL LOCAL ADR RULE (Judicial Council of the Ninth Circuit, Standing Comm. on Alternative Dispute Resolution 1999).

settlement conference) over a party's objection. Finally, ninety percent responded that they had seen cases where an ADR process helped to produce a settlement even though one or more of the parties initially resisted or was reluctant to use ADR.⁵¹

IV. SOME ISSUES AND CONCERNS

A. What Is the Purpose of ADR in the Federal Court System, and How Do We Evaluate Success?

There is a real danger that we will expect too much from court-annexed ADR and that we will permit ADR's success to be judged by criteria that fail to reflect the full range of values that ADR can advance. A study of the Demonstration Programs, which were established under the Civil Justice Reform Act, reported that the goals of the courts adopting case management programs varied from court to court.⁵² They included a desire to reduce cost and delay, to bring greater uniformity to case management, to establish judicial control of cases, to eliminate unnecessary discovery, and to create a system of accountability for judges and cases.⁵³ Thus, efficiency and reducing cost and delay appear to be the values that account for much of the interest of the courts in the ADR process. While these values are important, access to ADR, the potential for creative solutions, and the ability of the parties to participate in the outcomes should not be underestimated.⁵⁴ Other values include increasing the rationality, the fairness, and the civility of the disputing process; expanding the information base on which parties make key decisions in litigation and settlement; reducing parties' alienation from the justice system; expanding parties' opportunities to act constructively and creatively; helping parties understand and vent emotions; and expanding the parties' tools for dealing with the psychological, social and economic dynamics that always accompany and sometimes drive litigation.⁵⁵

⁵¹ Dorothy W. Nelson, *ADR in the New Era, into the 21st Century*, 19 ALTERNATIVES 65, 66 (2000).

⁵² DONNA STIENSTRA ET AL., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 (Federal Judicial Center 1997).

⁵³ *Id.*

⁵⁴ Linda R. Singer, *Future Looks Bright, but Challenges Include Retaining Our Core Values*, DISP. RESOL. MAG., Spring 2000, at 29.

⁵⁵ Brazil, *supra* note 27, at 37–38.

If we measure the success of our programs by the rate or timing of settlements, then court neutrals may permit settlements to dominate their processes. A neutral who feels pressure to "get the case settled" may be tempted to manipulate the parties toward that end. Neutrals will be tempted to be more evaluative than facilitative, which initially at least, should be their primary goal.

Certainly, the purpose of court-annexed ADR should not be defined as permitting courts to unburden themselves of unwanted classes of cases. The purpose of ADR is not to get the case out of the court just to make life easier for judges and administrators. Its purpose is to provide respect for the courts for providing dispute resolution tools that really give the parties an opportunity, successful or not, to try to solve their problems with some help from the neutral provided by the court.

In conclusion, some judges and judicial administrators might be attracted to ADR only or primarily as a docket reduction tool, and this could pose a threat to fairness and other values ADR should be promoting. There is also a risk that some judges and administrators might try to use ADR programs as a dumping ground for categories of cases that are deemed unpopular, unimportant, annoying, or especially difficult. A concern that the limited resources of the court may prompt process design decisions that compromise the quality of the court sponsored programs is also present. Therefore, courts should be very careful to design processes that serve appropriate goals and values.⁵⁶

B. Should Courts Adopt an "In-House" or an "Out-House" Model of ADR?

How a court defines the primary purpose of its program and how a court prioritizes the values and interests its program can affect the court's choices for delivering ADR services.⁵⁷

Magistrate Judge Wayne D. Brazil has described five "models" that courts might use for delivering ADR services.⁵⁸

1. Full-time in-house neutrals that the court hires and pays with public funds and who are full-time employees of the court.⁵⁹

2. A court contracts with a non-profit organization that provides the neutrals and administers the program. The parties may or may not pay fees.⁶⁰

3. A court directly pays individuals or firms to serve as neutrals.⁶¹

⁵⁶ Brazil, *supra* note 18, at 79.

⁵⁷ Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715, 718 (1999).

⁵⁸ *Id.* at 747.

⁵⁹ *Id.*

⁶⁰ *Id.* at 747-48.

4. A court recruits and trains private individuals who serve as neutrals and are available with no charge to the parties.⁶²

5. The court refers parties to private neutrals, who charge the parties market rates.⁶³

Judge Brazil concludes that no one model is superior to another in all settings but that it depends on a host of assumptions and variables such as purposes of the ADR programs, the kinds of cases and parties to be served, whether the process is mandatory or voluntary, whether the parties are represented by counsel, the volume of cases the system will be asked to accommodate, and the role the court wants the neutral to play.⁶⁴

He suggests that the staff neutral model is the most likely to inspire confidence in the motives that drive the court to establish an ADR process, the least likely to communicate to the public that an ADR process is second rate, and the most likely to communicate that the court defines itself as a service-oriented institution.⁶⁵ Also, in this model, the economic and social barriers to participation are likely to be lowest.⁶⁶

On the other hand, staff neutral models that provide for the hiring of only a few neutrals are inferior to those models that use a large and diverse pool of neutrals in inspiring confidence in the political and moral integrity of a program.⁶⁷ The models with a larger number of neutrals have a substantially greater capacity to provide parties with neutrals who have subject matter expertise.⁶⁸ Further, these models allow courts to offer ADR services to a much larger number of cases than courts that rely on a small cadre of professionals.⁶⁹

The staff neutral model is superior in developing sophisticated neutrals with more refined and sensitive process skills through continuous in-house training.⁷⁰ It also provides the most reliable and least expensive performance quality control.⁷¹ However, an important caveat is that there is a greater likelihood that there may be inappropriate communication between the neutral and the judge

⁶¹ *Id.* at 748.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 807.

⁶⁵ *Id.* at 808.

⁶⁶ *Id.* at 809.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 811.

⁷¹ *Id.*

when the neutral is a full time employee of the courts.⁷² Judges are keenly interested in the status of cases assigned to them and may not always be sensitive to confidentiality rules.⁷³

Finally, whatever model is used, it is clear that the quality of the neutral is the most important factor in determining the success of the ADR process.

C. Will Courts Overlegalize ADR, or Will ADR Enhance Court Practices?

Guarding against the overlegalization of ADR is a real need. In the early 1970s when the University of Southern California Dispute Resolution Center was assisting communities to set up neighborhood courts, some of our faculty were involved in training neighborhood neutrals. One day, two of those neutrals came to my office and suggested that the neutrals be given robes to wear so that they would be given proper respect. At that moment, I realized that our training of neutrals in the art of mediation was not complete! We must keep ADR from being just another arena in which litigation behaviors of some lawyers are played out. These behaviors include pressing specious arguments, concealing significant information or delaying its disclosure, obscuring weaknesses, misleading parties about projected evidence from percipient or expert witnesses, resisting well-made suggestions, intentionally injecting hostility into the process, remaining rigidly attached to positions not sincerely held, or needlessly protracting the proceedings to wear down the other parties or to increase their cost burdens.⁷⁴ If you look at the titles of some continuing education course with themes such as "How to Win in ADR" or "Successful Advocacy Strategies for Mediations" it appears that some of these behaviors may be encouraged.⁷⁵

As Professor Carrie Menkel-Meadow suggests, the term "mediation advocate" is an oxymoron.⁷⁶ Adversarial behaviors may make mediation, which is the most "alternative" to traditional adversary practice, into an adversarial proceeding, where lawyers on opposite sides prepare briefs or mediation submissions, plan opening statements and case narratives, ask for third party neutral evaluations, and direct their attention to the mediator, when they should be planning with their clients how to negotiate and problem-solve with the other side. Mediation should be a facilitated negotiation seeking agreement and

⁷² *Id.* at 798.

⁷³ *Id.*

⁷⁴ Brazil, *supra* note 27, at 29.

⁷⁵ *Id.*

⁷⁶ Carrie Menkel-Meadow, *Ethics in ADR Representation: A Road Map of Critical Issues*, DISP. RESOL. MAG., Winter 1997, at 3.

settlement and not a “decision-seeking” process.⁷⁷ Ideally, lawyers should be looking for solutions that maximize gain or minimize harm to all those involved in a legal problem.⁷⁸ They should be candid with their clients, mediators, arbitrators, judges, and opponents and should refuse to insist on an agreement or outcome that causes injustice or is worse than the outcome the parties could achieve in some other way such as litigation.⁷⁹ This is why it is important that all law schools, as The Ohio State University Moritz College of Law does, teach problem-solving skills. The curriculum should not end with doctrinal analysis, but should include other skills such as counseling, planning, negotiation, decision analysis, and applied psychology.

However, while problem solving is superior to dispute resolving in concept, we should not lose sight of the enormous potential of transformative mediation. “In problem-solving mediation, the most basic objective is to improve the parties’ situation from what it was before.”⁸⁰ In transformative mediation, the objective is defined as improving the parties themselves, to reconnect people to their own inner wisdom and common sense, to help parties to recognize and exploit the opportunities for moral growth inherently presented by conflict.⁸¹ “A transformative practice rests upon an emerging relational vision of human nature and society contrasting with the prevailing individualistic vision that often underlies a problem-solving orientation. It is a holistic approach to resolving conflict, as opposed to a technocratic approach.”⁸² This form of mediation is the closest to what Bahá’í consultation is supposed to be.

Equally important is that the popularity of certain features of ADR is beginning to affect court rules and procedures. For instance, mediation and arbitration both permit greater direct participation by parties in the process, and both provide a less adversarial forum. Adoption of new rules for settlement conferences, including encouraging the parties themselves to attend and participate directly in settlement discussions, has already brought ADR features

⁷⁷ *Id.* at 3, 4. See John A. Humbach, *The National Association of Honest Lawyers: An Essay on Honesty, “Lawyer Honesty” and Public Trust in the Legal System*, 20 PACE L. REV. 93, 98–99 (Fall 1999).

⁷⁸ Menkel-Meadow, *supra* note 77, at 5.

⁷⁹ *Id.*

⁸⁰ Dorothy W. Nelson, *ADR in the 21st Century: Opportunities and Challenges*, DISP. RESOL. MAG., Spring 2000, at 4.

⁸¹ *Id.*

⁸² *Id.*

into the court.⁸³ Thus, the character of our formal legal procedure is changing in response to the demonstrated appeal of process features used by ADR.⁸⁴

V. ADR AS APPLIED IN THE NINTH CIRCUIT

In the Ninth Circuit, there are many success stories of cases mediated on appeal. The Department of Justice in its submission to the Commission on Structural Alternatives for the Federal Courts of Appeal, stated that the Ninth Circuit's program is "particularly helpful to litigants and could serve as a model for other circuits."⁸⁵ Here are two brief examples.

The first involved an eviction action brought by an Indian tribe's (Tribe A) housing authority against tenants of residential housing units that the authority owns on trust land controlled by another tribe (Tribe B). Under the terms of the master lease between the Authority and Tribe B, the Authority built low-income units, which it then leased to members of Tribe B. A mediation was conducted at the reservation attended by over two dozen individuals, including tenants, Housing Authority board members, and tribal council members. Although the narrow issue on appeal was whether or not the district court erred in dismissing the eviction suit for lack of a federal question, at the mediation the real problem could be addressed in its broadest dimensions. Out of this arose a settlement agreement, whereby Tribe B would form its own housing authority, giving that tribe control over much of its residential housing. The parties encountered problems obtaining funds to fulfill the terms of the agreement; these problems were also resolved with the help of the circuit mediator. The case went back to the district court for approval of the settlement.

Another case started as a sexual harassment case by a community hospital technician against her supervisor. The plaintiff lost on summary judgment in the district court and appealed. She then sued in state court and lost. The plaintiff filed a second appeal, this time in state court. The hospital then sued her for defamation and related torts. Meanwhile, the plaintiff sued her attorney for his missing what turned out to be more than one deadline. As a result of the circuit court mediation, the three sets of parties (plaintiff, hospital, and former attorney) settled all four lawsuits.⁸⁶

These are just two of the hundreds of cases mediated successfully in the Ninth Circuit Court of Appeals. There are also successful programs in a number

⁸³ Edward F. Sherman, *Incorporating Alternative Dispute Resolution into the Litigation Process: The Present and the Future—An Introduction to the Symposium*, 15 REV. LITIG. 451, 461 (1996).

⁸⁴ See *id.*

⁸⁵ Lombardi, *supra* note 46, at 10 (citation omitted).

⁸⁶ *Id.* at 7–9.

of district courts in the Ninth Circuit. For instance, much has been written about the Northern District of California's ADR and Multi-Option programs.⁸⁷

A unique pilot project is underway in the district court in Oregon. The project is designed to promote the use of mediation to resolve selected environmental cases.⁸⁸ Since 1990, between twenty-three and thirty-five environmental lawsuits are filed annually in Oregon. These cases involve claims regarding water use, fishing rights, endangered species, Native American sacred remains, water and land pollution, hazardous waste clean up, impacts of proposed development, timber theft, and timber sales.⁸⁹

These cases are important in several respects. Although few proceed to actual trial, motion activity is significant. Judges, law clerks, and administrators report that these cases are paper and time intensive. Those resolved by consent decrees linger on the docket and may entail a managerial, long-term role for the court.⁹⁰

Environmental cases are resource-intensive. It is hard to find credible natural scientists, and the focus on "dueling experts" is a barrier to greater party involvement and exploration of the underlying interests of the parties. Also, such cases often present difficult questions of public interest involving people or entities not party to the lawsuit. Some are high stakes cases in terms of precedent and media interest. Often a wide variety of interests participate, including tribes, federal entities, states, local political subdivisions, public interest groups, private entities, industry, and commercial and sports fishing interests. These cases involving long-term, multiple interests require durable solutions, not just swift disposition.⁹¹

Instead of revolving around the question of damages for retrospective harms, environmental cases often center on future problem solving. It is hard for courts to fashion solutions that are sufficiently flexible and that can account for future environmental and financial uncertainties such as changing habitat, water levels, species levels, and political settings.⁹²

⁸⁷ STIENSTRA ET. AL., *supra* note 52, at 173–210.

⁸⁸ Lisa A. Kloppenberg, Implementation of Court-Annexed Environmental Mediation: The District of Oregon Pilot Project, 1 (Feb. 2001) (unpublished manuscript on file with author).

⁸⁹ *Id.* at 1.

⁹⁰ *Id.*

⁹¹ *Id.* at 2.

⁹² *Id.*

This pilot project⁹³ is but one example of how much research is needed to learn about and evaluate the progress of ADR in various fields. This particular study is especially important, because mediated environmental settlements have recently come under attack. In many instances, the parties to the mediation have unequal bargaining power, with one of the parties often a powerful multinational company with significant resources to delay proceedings.⁹⁴ Thus, the decision to mediate may result in the failure of justice and perhaps an opportunity for courts to articulate public values.⁹⁵ Nonetheless, ADR provides interesting alternatives in situations where, although there is a good chance of victory by a powerful multi-national, there may be questions of public relations or of continued existence with a potential adversary.⁹⁶ If one of the parties is a public utility or a business depending on large numbers of customers, it may find ADR better than litigation it can win because the litigation will engender adverse publicity.⁹⁷

VI. CONCLUSION

There is certainly a distance yet to travel with court-annexed ADR. Many questions are yet to be answered, such as whether the courts will have the resources and capability to run these programs and ensure the quality of their services; whether courts will adopt appropriate criteria for measuring success; whether courts should provide these services directly at public expense or farm them out to private parties; whether courts and lawyers will over legalize ADR; or whether, instead, ADR will enhance court practices. Based upon my experience with the Ninth Circuit, I am very optimistic about the future.

I end with the words of Dean Anthony Kronman of the Yale Law School who wrote in 1993 in his important book *The Lost Lawyer*:

A good lawyer must . . . be more than a skillful advocate who uses his energy and learning to promote the private interests of his clients within a framework of public norms whose soundness is taken for granted. He must also

⁹³ The sponsors of the project include the U.S. District Court for the District of Oregon, the U.S. Institute for Environmental Conflict Resolution, the Western Justice Center Foundation, and the ADR Program of the University of Oregon School of Law. *See id.* at 3.

⁹⁴ *See* Leigh West, *Mediated Settlement of Environmental Disputes: Grassy Narrows and White Dog Revisited*, 18 ENVTL. L. 131, 142 (1987).

⁹⁵ *Id.*

⁹⁶ Frank P. Grad, *Alternative Dispute Resolution in Environmental Law*, 14 COLUM. J. ENVTL. L. 157, 185 (1989).

⁹⁷ *Id.*

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be a public-spirited reformer who monitors this framework itself and leads others in campaigning for those repairs that are required to keep it responsive and fair.⁹⁸

⁹⁸ ANTHONY T. KRONMAN, *THE LOST LAWYER* 18–19 (1993).

